

COMMENTS

PLEADING FOR FREEDOM: THE THREAT OF GUILTY PLEAS INDUCED BY THE REVOCATION OF BAIL

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INTRODUCTION

Imagine a construction worker, Barry, stopped by police officers walking home from work. In his pocket is a roll of twenty-dollar bills and a white powdery substance—left over dry wall from the house his team is currently building. The police officers do not know that he regularly works with dry wall, and immediately suspect the powder to be cocaine. One of the officers runs a field-test on the substance, and it erroneously comes back positive. Barry is arrested. With strong ties to the community and with no prior convictions, he is able to secure a reasonable bail amount, and makes bail. While out on bail, he actively assists his public defender in preparing for his case. He secures employment records, and recruits a number of co-workers to appear in court and testify on his behalf. His employer, while concerned about the time he is spending preparing for trial, has never suspected Barry of using drugs, and supports his claim of innocence.

One of the conditions of Barry's release was that he be home every night by midnight. The following week his construction team is having a birthday get-together at the foreman's house after work, and Barry catches a ride with one of his co-workers. At around 11:00 p.m. he is ready to go, but his co-worker is slightly intoxicated and wants to wait another half hour to sober up. Thirty minutes turns into forty-five, and Barry becomes worried that he is going to miss his curfew. His co-worker agrees to drive him home, but it is already approaching midnight. On the way home, the pair gets pulled over. Suspecting the driver is intoxicated, the officer pulls them both out of the car and runs their licenses. At this point it is past midnight, and the

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officers decide to take them into the precinct.

The prosecutor and Barry's public defender show up at the precinct the next day. The prosecutor has an offer to make to Barry. In exchange for Barry's guilty plea, he is willing to recommend to the judge that Barry be sentenced only to probation. "If you still decide you want to go to trial," the prosecutor says, "well, then I will have your bail revoked and you can spend the next few weeks in jail until the lab results come back and we are ready for trial." More worried about the status of his job at the construction company than the probationary sentence, Barry agrees to plead guilty even though he knows he never possessed cocaine.

Now consider another scenario in which the prosecutor simply motions to revoke Barry's bail. Barry, facing weeks in jail awaiting trial, just wants the whole ordeal to end. He asks his public defender to get him a deal, and eventually pleads guilty and is sentenced to probation on the prosecutor's recommendation. In both scenarios, it was the revocation of bail that ultimately affected an innocent defendant's choice to plead guilty.

Much has been written about the pressures pretrial detention places on criminal defendants.¹ This Comment will explore the pressures the revocation of pretrial detention can place on a defendant, and what procedures can be instituted within the confines of the U.S. criminal justice system to ease these pressures.

Part I of this Comment will recount the history of bail from the founding to the Supreme Court decision of *United States v. Salerno* in 1987. Part II will discuss whether a prosecutor's decision to intentionally induce a defendant to plead guilty by revoking bail will result in an invalidation of that guilty plea. Part III will explore the more likely scenario of whether a sincere revocation of bail can nonetheless invalidate a defendant's guilty plea as involuntary.

Finally, in the event that a sincere revocation cannot invalidate a guilty plea, Part IV will discuss potential alternatives to requiring a defendant to languish in jail awaiting trial. The first opportunity to mitigate the effects of pretrial detention causing a guilty plea is at the revocation hearing itself. The lack of adversarial testing at the initial bail hearing provides good reason to reconsider the initial conditions imposed, and provides an opportunity to institute proper conditions in light of the entirety of the circumstances as the defendant stands before the court. Another point in which the effect of pretrial detention can be minimized is at the plea itself. Here, if the defendant is willing and the parties are prepared, an accelerated trial date minimizes the time a defendant needs to spend in pretrial detention prior to an adjudication of guilt or innocence.

¹ See generally, e.g., Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510 (1986); Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L.J. 1344 (2014).

I. A BRIEF HISTORY OF BAIL

In order to understand the parameters of pretrial detention, it is necessary to explore its historical foundations. Starting from the founding of America, up to the most recent significant Supreme Court challenge to pretrial detention, bail has only ever served two primary regulatory goals: to ensure the defendant's presence at trial, and to prevent the defendant from committing pretrial crimes if released pending a determination of guilt.² Other prosecutorial motives run the risk of being considered punishment, and running afoul of the prohibition on punishing a defendant prior to an adjudication of guilt.

A. Pretrial Detention in Early America

Pretrial detention in early America was derived from the English model.³ Early bail decisions consisted of two distinct parts: (1) whether the defendant was to be permitted to bail or denied bail and (2) if the defendant was permitted to bail, at what amount bail was to be set.⁴ In Colonial America, bail was a tool used solely to ensure the accused appeared at trial.⁵ The prohibition on pretrial punishment, therefore, played a substantial role in bail arguments.⁶ Indeed, this prohibition lay at the foundation of the United States criminal justice system, and it applied to all defendants accused of a crime in its courts.⁷ In the early years of the United States and its Constitution, the prohibition on pretrial punishment was believed to provide criminal defendants with a presumption that, at least in non-capital cases, they would be

² The latter was not legitimized until the 1980s. See *infra* notes 23–32 and accompanying text.

³ See June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 529 (1983) (finding that the English brought the English bail statute across the Atlantic and the early colonies applied the English law verbatim).

⁴ *Id.* at 534.

⁵ See Clara Kalhous & John Meringolo, *Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys' Perspective*, 32 PACE L. REV. 800, 806–07 (2012) (finding that between 1776 and 1966 bail decisions in the colonies weighed factors that were used as proxies for a failure to appear at trial).

⁶ See *id.* at 802 (“Bail in the federal system ‘is rooted in the belief that a person who has not yet been convicted of a crime should ordinarily not spend any extended period of time in jail.’” (quoting H.R. REP. NO. 98-1121, at 16 (1984))).

⁷ See *Coffin v. United States*, 156 U.S. 432, 453 (1895) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”). The Court in *Coffin* traced the history of the presumption of innocence to the Book of Deuteronomy, the Law of Sparta and Athens, Roman Law, and Blackstone. *Id.* at 454–56. In my view, the terms “presumption of innocence” and “prohibition on pretrial punishment” are completely interchangeable. The Supreme Court, however, has stated that the presumption of innocence is nothing more than a doctrine allocating the burden of proof in criminal trials. *Bell v. Wolfish*, 441 U.S. 520, 533 (1979). Therefore, I will use the term “prohibition on pretrial punishment” whenever possible to be clear that I am not invoking the presumption of innocence as a doctrine.

eligible for release while they awaited trial.⁸ Even beyond the Constitution, the First Congress found it important to allow judges the discretion to admit bail in all non-capital offenses.⁹ This presumption held true through the nineteenth century, and allowed a great number of defendants to be eligible for release pending trial.¹⁰

Capital cases were an exception to the presumption of bail due to the grave punishment that attended such charges. The idea was that if the defendant was eligible for the death penalty, a defendant with nothing to lose would have an irresistible incentive to flee before trial.¹¹ In determining whether to set bail in capital cases, the Judiciary Act of 1789 permitted judges to “exercise their discretion . . . regarding the nature and circumstances of the offence, and of the evidence, and the usages of law.”¹² This was a reformation of the evaluation states had previously instituted which denied bail to capital defendants where the “proof [was] evident” or the “presumption great.”¹³

In cases where the defendant was admitted to bail, the next question of importance to the defendant was at what amount bail was to be set. The amount a defendant was required to pay was prohibited from being excessive by the Eighth Amendment.¹⁴ In setting bail, early judges relied heavily on the seriousness of the offense charged and, to some extent, the weight of the evidence against the accused.¹⁵ Taken together, these two factors served as

⁸ Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 728 (2011). This presumption is grounded in the language of the Due Process Clause. See CHARLES GROVE HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* 104 (1930) (“It is commonly conceded that the purpose of the phrase ‘by the law of the land,’ which was later transformed into the more popular form ‘due process of law,’ was intended primarily to insist upon rules of procedure in the administration of criminal justice, namely, that judgment must precede execution, that a judgment must be delivered by the accused man’s ‘equals,’ and that no free man could be punished except in accordance with the law of England . . .”).

⁹ See Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (“[U]pon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death . . .”).

¹⁰ See *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (highlighting the importance that providing bail before trial plays in the prohibition on pretrial punishment as a means for defendants to prepare their defense and prevent infliction of punishment prior to conviction beyond a reasonable doubt); *Hudson v. Parker*, 156 U.S. 277, 285 (1895) (“The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error.”).

¹¹ Baradaran, *supra* note 8, at 730.

¹² Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91.

¹³ See Kalhous & Meringolo, *supra* note 5, at 806 (recounting that Pennsylvania’s formulation of an accused’s right to bail “unless for capital Offenses, where proof is evident or the presumption great” became the model for many states) (quoting GREAT LAW OF PENNSYLVANIA, ch. 61 (1682), reprinted in *ANNALS OF PENNSYLVANIA, FROM THE DISCOVERY OF THE DELAWARE* 631–32 (Samuel Hazard, ed., Philadelphia 1850)).

¹⁴ U.S. CONST. amend. VIII.

¹⁵ See Carbone, *supra* note 3, at 540–52 (chronicling the factors that motivate bail amounts and concluding that seriousness of the offense was the most important factor). Early decisions did not take

a proxy for the likelihood the accused would return for trial. In cases where the defendant was accused of a serious crime, the prospect of a lengthy prison sentence was thought to incentivize a defendant to flee rather than face the threat of punishment if convicted, regardless of whether the charge had merit.¹⁶ In contrast, the strength of the evidence stood as a counterweight to the charge's seriousness. In jurisdictions that allowed it, if the government's case was weak, a defendant could have his bail reduced despite being charged with an offense with a lengthy sentence.¹⁷ Overall though, it was the seriousness of the offense that predominated bail determinations,¹⁸ and the focus of the determination was based solely on whether the accused was likely to appear for trial.¹⁹

B. *The Bail Reform Acts of 1966 and 1984*

With courts' history of declining to take the defendant's financial circumstances into account when setting a bail figure,²⁰ wealthy defendants were more likely to be able to afford bail. In response to a number of studies undertaken in the 1950s and early 1960s suggesting that the current bail mechanisms were unnecessarily keeping indigent defendants in pretrial detention,²¹ Congress formulated the Bail Reform Act of 1966.²² The 1966 Act implemented two main goals for the federal system: (1) it prevented the accused's financial status from causing a defendant to be detained pretrial, and

into account the criminal history, or the financial circumstances of the accused, but between the late nineteenth and early twentieth century, those factors began making their way into bail determinations. *Id.* at 546, 550.

¹⁶ *See id.* at 542 (criticizing the rationale given by courts that concluded that the more serious the crime charged, the more severe the potential penalty, and therefore the greater the incentive for the defendant to flee). Interestingly, some have argued that seriousness of the offense charged may be a better proxy for dangerousness than flight. *See* Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 BERKELEY J. CRIM. L. 1, 10 (2008) (arguing that seriousness of the offense charged should be thought of as a proxy for the public safety factor in bail determinations). Nonetheless, during early United States history it was used as a proxy for flight.

¹⁷ *See* Carbone, *supra* note 3, at 545 (explaining that bail decisions were more likely to be overturned if they commented on the strength of the evidence rather than its weakness).

¹⁸ *Id.* at 551.

¹⁹ *See* Baradaran, *supra* note 8, at 738 ("Until the 1950s, judges presumed bail for all noncapital defendants and were only permitted to deny bail where there was a risk of flight.").

²⁰ Carbone, *supra* note 3, at 548.

²¹ *See, e.g.*, CALEB C. FOOTE, STUDIES ON BAIL (1966); *Manhattan Bail Project, Official Court Transcripts—October 1961 to June 1962*, VERA INSTITUTE (1962), <https://www.vera.org/publications/manhattan-bail-project-official-court-transcripts-october-1961-june-1962>. The bail system was dominated by bondsmen and would often put bail outside the defendant's means even if they should have been released. WAYNE H. THOMAS, JR., BAIL REFORM IN AMERICA 15 (1976).

²² Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (1966) [*hereinafter* "the 1966 Act"], *repealed by* Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1976–87 (1984) (codified as amended at 18 U.S.C. §§ 3141–50 (2012)) [*hereinafter* "the 1984 Act"].

(2) it prevented considerations other than nonappearance at trial to be considered when assessing bail in non-capital cases.²³ While still permitting judges to require a bond, the 1966 Act attempted to make release without having to pay money the norm, not the exception.²⁴ The result was an increase in the number of defendants released pending trial.²⁵

The Bail Reform Act of 1984 dramatically altered the previous system that only measured the defendant's flight risk.²⁶ It responded to an admitted shortcoming of the 1966 Act, namely, the problem of defendants released pretrial committing crimes while awaiting trial.²⁷ The Senate Judiciary Committee, while evaluating alternatives, premised its concerns on a study which concluded that one out of every six released defendants were rearrested during their pretrial release period.²⁸ The 1984 Act set out to remedy this purported problem. Specifically, the 1984 Act permitted judges to detain defendants without bond if the accused posed a danger to the community if released, in addition to the determination of the traditional risk of failing to appear at trial.²⁹ Although detention for dangerousness was available in only a defined set of circumstances,³⁰ this was the first time that Congress permitted defendants nationwide to be detained pretrial for reasons other than the fear of their failure to appear for trial.³¹ When compared to the previous procedures implemented by the 1966 Act, the result was a significantly greater number of defendants being detained prior to a determination of

²³ Warren L. Miller, *The Bail Reform Act of 1966: Need for Reform in 1969*, 19 CATH. U. L. REV. 24, 24 (1969) (citing 18 U.S.C. § 3146(a) (Supp. IV, 1969)).

²⁴ *Id.* at 30.

²⁵ See Donald P. Lay & Jill De La Hunt, *The Bail Reform Act of 1984: A Discussion*, 11 WM. MITCHELL L. REV. 929, 932 (1985) (“[B]etween 1962 and 1971, the proportion of felony defendants on pretrial release rose from forty-eight percent to sixty-seven percent.”).

²⁶ Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1985 (1984) (codified as amended at 18 U.S.C. §§ 3141–50 (2012)).

²⁷ H.R. REP. NO. 89-1541, at 5–6 (1966).

²⁸ S. REP. NO. 98-225, at 6 (1983).

²⁹ 18 U.S.C. § 3142(e), (f)(1) (Supp. II 1982). The language “the safety of the community or any person” used in the 1984 Act was meant to serve as a substitute for the general concept of dangerousness. See S. REP. NO. 98-225, at 12 (1983) (explaining that 18 U.S.C. § 3142 placed considerations of dangerousness on the same footing as considerations of appearance).

³⁰ Defendants were permitted to be detained pretrial if they posed a danger to the community under four circumstances: (1) if the alleged offense was a crime of violence, (2) if the alleged crime was punishable by life imprisonment or death, (3) if the alleged crime was a drug offense punishable by at least ten years in prison, or (4) if the alleged crime was a felony and the accused had two prior felonies that fit into circumstances (1) to (3). 18 U.S.C. § 3142(f)(1)(A)–(D). Alternatively, defendants could be detained pretrial if they posed a risk of flight or obstruction of justice regardless of the type of offense they were charged with. 18 U.S.C. § 3142(f)(2)(A), (B).

³¹ Congress had previously authorized courts in the District of Columbia to detain defendants awaiting trial out of fear of danger to the community. District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, 84 Stat. 475 (1970); see also Alschuler, *supra* note 1, at 512 n.3 (finding that the legislative record shows the authors of the 1984 Act borrowed from the District of Columbia legislation).

their guilt.³²

C. United States v. Salerno—*A Challenge to the 1984 Act*

The introduction of pretrial detention solely for reasons of dangerousness dashed the hope of many wishing for a sustained decrease in pretrial detention. The 1984 Act quickly came under challenge. The most formidable challenge to the 1984 Act presented itself in *United States v. Salerno*.³³

1. *Factual Background*

Anthony Salerno, the defendant, was arrested with his codefendant Vincent Cafaro on Racketeer Influenced and Corrupt Organizations (“RICO”) charges on March 21, 1986.³⁴ At his arraignment, the government conceded that neither Salerno nor Cafaro posed a flight risk, but asked the court to nonetheless detain both defendants in accordance with the then-recently passed 1984 Act, claiming that there was no condition or combination of conditions which would assure the safety of the community if they were released.³⁵ The government argued that the defendants’ alleged criminal activities depended on their ability and willingness to use violence in furtherance of their criminal objectives.³⁶ After hearing the evidence that the government proffered regarding the particulars of the defendants’ criminal activity, the district court found that the government had established by clear and convincing evidence that Salerno was the boss of an organization engaged in violent criminal activity.³⁷ Relying on the 1984 Act, the district court ordered both defendants detained awaiting trial because their release would threaten the safety of others in the community.³⁸

Salerno appealed the district court’s opinion to the Second Circuit claiming, *inter alia*, that the 1984 Act violated the Due Process Clause of the United States Constitution.³⁹ A divided panel agreed with Salerno finding that the

³² See Baradaran, *supra* note 8, at 752 (“The 1984 Act increased the number of federal prisoners by 32% in 1985.”).

³³ 481 U.S. 739 (1987).

³⁴ *Id.* at 743.

³⁵ Daniel Richman, *United States v. Salerno: The Constitutionality of Regulatory Detention*, in *CRIMINAL PROCEDURE STORIES* 413, 422 (Carol S. Steiker ed., 2006).

³⁶ *United States v. Salerno (Salerno I)*, 631 F. Supp. 1364, 1367 (S.D.N.Y. 1986).

³⁷ *Id.* at 1371.

³⁸ *Id.* at 1375.

³⁹ *United States v. Salerno (Salerno II)*, 794 F.2d 64, 66 (2d Cir. 1986). Salerno rested his argument, in part, on the “bedrock ‘axiomatic and elementary’ principle whose enforcement lies at the foundation of the administration of [the] criminal law,” that is, the prohibition on pretrial punishment. Brief for Respondent, *United States v. Salerno*, 794 F.2d 64 (2d Cir. 1986) (No. 86-67), 1986 WL 727532, at *17. Salerno’s other argument was based on the statute itself, which the Second Circuit found unconvincing. *Salerno II*, 794 F.2d at 66.

detention of a defendant charged with a violent crime for no reason other than the worry that he might continue the acts he is accused of would violate substantive due process.⁴⁰ Ultimately, the Second Circuit held that to the extent the 1984 Act authorized detention on the sole grounds that the defendant would pose a danger to society if released, it was unconstitutional.⁴¹ Even though the Second Circuit agreed with the government that the scheme of pretrial detention under the 1984 Act was a regulatory measure, it found that the Due Process Clause prohibited such detention without regard to its duration.⁴² Incarceration to protect society, the Second Circuit found, “may be accomplished only as punishment of those convicted for past crimes and not as regulation of those feared likely to commit future crimes.”⁴³

2. *The Supreme Court’s Decision*

The Second Circuit’s reversal created an interesting conflict with other circuits. As Justice Rehnquist would note, every other circuit to have considered a facial challenge to the 1984 Act had upheld its constitutionality.⁴⁴ Ultimately, the Supreme Court reversed the Second Circuit and upheld the constitutionality of the 1984 Act, allowing the government to move for the detention of defendants when it believed their release would pose a danger to society.⁴⁵ While the 1984 Act also survived an Eighth Amendment challenge,⁴⁶ the real fight took place in the arena of the Due Process Clause of the Fifth Amendment.⁴⁷

In making a facial challenge to the 1984 Act, Salerno would have to show that there was no set of circumstances in which the 1984 Act survived scrutiny—a heavy burden.⁴⁸ Salerno’s primary argument was that the 1984 Act constituted impermissible punishment before trial.⁴⁹ To succeed, Salerno had to first convince the Court that his pretrial detention constituted punishment. The problem with that argument, the Court found, was that pretrial detention pursuant to the 1984 Act did not constitute punishment, at least as

⁴⁰ See *id.* at 73 (finding the authorization of pretrial detention as a means for preventing future crimes repugnant to substantive due process).

⁴¹ *Id.* at 74–75.

⁴² *Id.* at 71. The fact that this scheme was regulatory instead of punitive, it turns out, would have dire consequences for Salerno in the Supreme Court.

⁴³ *Id.* at 72 (quoting *United States v. Melendez-Carrion*, 790 F.2d 984, 1001 (2d Cir. 1986)).

⁴⁴ See *United States v. Salerno (Salerno III)*, 481 U.S. 739, 741 n.1 (1987) (finding that circuit courts in the Third, Seventh, Eleventh, and D.C. Circuits all rejected facial constitutional challenges to the 1984 Act).

⁴⁵ *Id.* at 741.

⁴⁶ See *id.* at 752–55 (holding that the 1984 Act did not, on its face, violate the Excessive Bail Clause of the Eighth Amendment).

⁴⁷ See *id.* at 746–52 (upholding the 1984 Act against Salerno’s Due Process Clause challenge).

⁴⁸ *Id.* at 745.

⁴⁹ *Id.* at 746.

a facial matter.⁵⁰ Instead, the detention of a defendant awaiting trial pursuant to the 1984 Act was a mere regulatory act by the government.⁵¹

In coming to this conclusion, the Court drew on a line of precedent demarcating the boundary between a punitive goal and a regulatory one.⁵² Focusing heavily on Congress's intent in passing the 1984 Act, the Court concluded that if Congress did not expressly intend pretrial detention to be punitive, it could only be regarded as punitive if Congress's intention was pretextual, or if its means were excessive in relation to its regulatory purpose.⁵³

As for Congress's purpose, the Court found evidence in the legislative history that Congress intended detention for dangerousness to be regulatory.⁵⁴ The 1984 Act was passed to identify a small group of dangerous defendants who posed a danger to society if released, and who would not be deterred from committing crimes while out on bail by the imposition of harsh release conditions or the threat of revocation.⁵⁵ The Court found the measures that Congress used to combat this issue proportional because it limited the circumstances under which the government could move for pretrial detention to those accused of crimes of violence, offenses for which the sentence was life imprisonment or death, serious drug offenses, and certain repeat offenders.⁵⁶ Further, there were ample procedural safeguards in place

⁵⁰ See *id.* at 746 (“The Government, however, has never argued that pretrial detention could be upheld if it were ‘punishment.’”).

⁵¹ See *id.* at 746–47 (“[T]he mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment.”). The inability of Salerno to convince the Court that his pretrial detention should be considered punishment ended up being the death knell to his challenge of the 1984 Act.

⁵² The Court drew on *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), *Bell v. Wolfish*, 441 U.S. 520 (1979), and *Schall v. Martin*, 467 U.S. 253 (1984), and applied a version of the test that mimicked the Court's most recent decision in *Schall*, but eschewed the more involved factors espoused in *Wolfish* and *Mendoza-Martinez*. *Salerno III*, 481 U.S. at 746–48.

⁵³ *Salerno III*, 481 U.S. at 747. The Court also held that a measure intended to be regulatory could be punitive if there were no alternative purpose to which the measure could rationally be connected, and that alternative purpose was assignable to the measure. *Id.* Beyond its statement of this factor, the Court did not address it any further.

⁵⁴ *Id.* The Senate Report on which the Court relied indicated that Congress meant to address the problem of crimes being committed by those on pretrial release. S. REP. NO. 98-225, at 5 (1983). To combat this problem, the Senate Judiciary Committee thought it would be proper to give judges a tool to detain pretrial those defendants who posed a grave risk to the safety of the community. *Id.* In considering whether such detention would constitute punishment, the Senate Committee drew from *United States v. Edwards*, a challenge to the District of Columbia statute that also allowed for pretrial detention based on dangerousness. 430 A.2d 1321 (D.C. Cir. 1981) (en banc). Pulling from the reasoning in that opinion, the Senate Judiciary Committee concluded that the 1984 Act, as proposed and eventually implemented, constituted a constitutionally permissible regulatory, rather than penal, sanction. S. REP. NO. 98-225, at 8.

⁵⁵ S. REP. NO. 98-225, at 6–7.

⁵⁶ *Salerno III*, 481 U.S. at 747.

to ensure that only those who were within the regulatory goal would be detained, and that they would not be detained longer than necessary.⁵⁷

However, the Court could not end its analysis there. The Second Circuit itself had concluded that the 1984 Act did not inflict pretrial punishment, but that ordering pretrial detention solely because the defendant was a danger to the community could not be permissibly imposed in accordance with the Due Process Clause.⁵⁸ The Court thought this conclusion inaccurate. Citing a number of instances throughout the country's history in which the government was allowed to detain citizens for a regulatory purpose, the Court found no categorical imperative preventing regulatory detention.⁵⁹ Instead, the government's legitimate and compelling interest in preventing crime outweighed the accused's admittedly "strong interest in liberty."⁶⁰ Therefore, the 1984 Act's detention of defendants on account of their dangerousness was upheld as a permissible regulation aimed at preventing defendants from committing crimes while they awaited trial.⁶¹

Since *Salerno*, the state of pretrial detention has not changed much. The twin goals of pretrial detention—assuring the accused's presence at trial and preventing their commission of crimes while released—still stand as the legitimate purposes of pretrial detention. Absent one of those regulatory goals, the defendant's pretrial detention is constitutionally suspect.

II. DUE PROCESS AND THE REVOCATION OF BAIL WITH THE INTENT TO INDUCE A GUILTY PLEA

Defendants who are fortunate enough to make bail may nonetheless be required to comply with exacting bail conditions upon their release.⁶² A prosecutor who observes that a defendant has violated one of these conditions may view it as an opportunity to induce him to plead guilty. This tactic gives the defendant the option of either pleading guilty or being detained pending trial. Revocation of bail, therefore, provides the prosecutor with a bargaining chip, one not dissimilar from threatening greater charges in attempt to induce a guilty plea. In *Bordenkircher v. Hayes*, the Court affirmed the prosecutor's ability to use

57 *See id.* (finding that the prompt detention hearing and Speedy Trial Act circumscribed the length of time a defendant would be subject to pretrial detention).

58 *Salerno II*, 794 F.2d 64, 71 (2d Cir. 1986).

59 *Salerno III*, 481 U.S. at 748.

60 *See id.* at 749–51 (finding that Congress's circumscribed scope of pretrial detention for dangerousness was instituted in a fair manner consistent with Due Process).

61 *Id.* at 752.

62 *See, e.g.*, Dan Markel & Eric J. Miller, *Bowling, as Bail Condition*, N.Y. TIMES (July 13, 2012), <http://www.nytimes.com/2012/07/14/opinion/not-yet-tried-but-sentenced-to-red-lobster.html> (recounting popular pretrial release conditions such as mandatory drug testing, attendance of rehabilitation programs, and mandatory job training programs).

additional charges as a threat to persuade the defendant to plead guilty.⁶³ Applying the rationale in *Bordenkircher* to the bail context, prosecutors may believe that it is permissible to use the threat of revoking the defendant's bail to intentionally induce a guilty plea. There are legitimate reasons, however, to doubt whether such a course of conduct is constitutional.

A. *Bordenkircher v. Hayes: Tacking on Additional Charges to Induce a Guilty Plea is Permissible*

In *Bordenkircher*, the defendant, a two-time felon, was facing charges of check-forging.⁶⁴ During plea negotiations the prosecutor threatened to return to the grand jury and seek an additional habitual offender charge if Hayes did not agree to plead guilty.⁶⁵ Calling the prosecutor's bluff, Hayes decided to test his luck at trial.⁶⁶ The prosecutor made good on his threat to reindict, and Hayes was found guilty on both the principal and habitual offender charges.⁶⁷

In challenging his conviction, Hayes' habeas petition made it all the way to the Supreme Court. He claimed that the Due Process Clause of the Fourteenth Amendment was violated when the prosecutor reindicted him on a more serious charge simply because he did not plead guilty to the original offense.⁶⁸ Unfortunately for Hayes, the Supreme Court disagreed. To the Court, the institution of plea bargaining flowed "from the 'mutuality of advantage' to defendants and prosecutors,"⁶⁹ making every plea, to some extent, induced by the promises of prosecutors.⁷⁰ Despite the additional pressure of another charge, Hayes never lost the ability to make an intelligent choice between foregoing his right to trial by pleading guilty, and facing the consequences that would attend exercising his trial right.⁷¹

Defendants, as a result of plea bargaining, can avoid "extended pretrial incarceration and the anxieties and uncertainties of a trial," as well as gain

⁶³ 434 U.S. 357, 365 (1978).

⁶⁴ *Id.* at 358; *Hayes v. Cowan*, 547 F.2d 42, 43 (6th Cir. 1976).

⁶⁵ *Bordenkircher*, 434 U.S. at 358.

⁶⁶ *Id.* at 359.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 363 (quoting *Brady v. United States*, 397 U.S. 742, 752 (1970)).

⁷⁰ *Bordenkircher*, 434 U.S. at 363.

⁷¹ *Id.* at 363–64. Further, in his dissent, Justice Blackmun argued that finding the prosecutor's actions impermissible would do little to protect criminal defendants. *Id.* at 368 (Blackmun, J., dissenting). Since it was undisputed that the prosecutor in Hayes' case could have brought both the check-forging charge and the recidivist charge before entering into plea negotiations, a prosecutor seeking the same guilty plea could have brought both charges, and then offered to drop the recidivist charge in exchange for a guilty plea to the check forging charge. If anything, bringing both charges in the first instance may exert greater pressure on defendants because they would likely face increased bail, and a greater likelihood that the court would reject the bargained plea. *Id.*

“a speedy disposition of [their] case . . . and a prompt start in realizing whatever potential there may be for rehabilitation.”⁷² The government, on the other hand, can “conserve vital and scarce resources,” and protect the public from the “risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings.”⁷³ While there are certain threats which can destroy the mutuality of advantage,⁷⁴ bargaining around charges supported by probable cause theoretically allows defendants to intelligently weigh the pros and cons of going to trial, and make a decision that benefits both sides of the agreement.

B. The Difference Between Bringing Additional Charges and Revoking a Defendant’s Bail

Threatening to revoke a defendant’s bail, however, is not the same as threatening to bring additional, legitimate charges. Bringing charges is the method by which the state initiates its imposition of punishment.⁷⁵ American prosecutors possess wide latitude on when, and which charges to bring.⁷⁶ Considerations that guide prosecutors in charging decisions are aimed at ensuring an accurate trial leading to an eventual conviction beyond a reasonable doubt.⁷⁷

In contrast, the constitutionality of pretrial detention has been upheld on the grounds that it is a regulatory, not punitive measure.⁷⁸ When determining whether a government action such as pretrial detention is punitive, courts

⁷² *Blackledge v. Allison*, 431 U.S. 63, 71 (1977).

⁷³ *Id.*

⁷⁴ *See, e.g., Blackledge v. Perry*, 417 U.S. 21, 28–29 (1974) (finding that vindictively bringing an additional charge after a defendant decides to bring an appeal burdens a defendant’s right to appeal); *North Carolina v. Pearce*, 395 U.S. 711, 723–25 (1969) (finding that sentencing a defendant to a more serious sentence after successfully attacking a conviction is assumed to be vindictive).

⁷⁵ *See* PAUL H. ROBINSON, *CRIMINAL LAW: CASE STUDIES & CONTROVERSIES* 87 (3d ed. 2012) (asserting that the criminal law’s defining feature is its propensity to impose punishment).

⁷⁶ *See* Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 *SETON HALL CIR. REV.* 1, 4 (2009) (finding few legal restraints on prosecutorial discretion). The only real restraints on a prosecutor’s election of charges require that the charges he brings be supported by probable cause, and prohibit the bringing of charges in contravention of the Equal Protection or Due Process Clauses. *Id.* at 4–6.

⁷⁷ *See, e.g., U.S. ATT’YS’ MANUAL* § 9-27.420, <https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.420> (requiring the prosecutor to believe he will secure a conviction by a standard of proof of beyond a reasonable doubt); *CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION* § 3-5.6(g) (AM. BAR ASS’N 2015), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html (mandating that there be sufficient admissible evidence to sustain a conviction prior to charging).

⁷⁸ *See* *United States v. Salerno (Salerno III)*, 481 U.S. 739, 748 (1987) (“We conclude, therefore, that the pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause.”); *Bitter v. United States*, 389 U.S. 15, 16–17 (1967) (reversing a defendant’s conviction because a revocation of bail had the “appearance and effect of punishment”).

will first look to whether there is an intent to punish.⁷⁹ If intent to punish is found, the inquiry shifts to whether the action in question is reasonably related to a legitimate government interest, and whether it is excessive in relation to that interest.⁸⁰

Keeping in mind that the twin regulatory purposes of pretrial detention are to prevent both flight and the commission of pretrial crimes,⁸¹ when a prosecutor attempts to revoke a defendant's bail for the purposes of inducing a guilty plea, the regulatory justifications for bail become inapplicable, as the purpose of placing the defendant in detention shifts from preserving a future trial, to bypassing one altogether. Without these two regulatory justifications, pretrial detention becomes nothing more than pretrial punishment in contravention of due process.⁸² The only conceivable interest that the prosecutor may have is to persuade the defendant to forego his right to plead not guilty and proceed to trial—that is, an interest in efficiency and economy.⁸³ It is possible to view pretrial detention as a bargaining chip which can grease the wheels of an otherwise inefficient and overburdened criminal justice system.⁸⁴ Without applying pressure to defendants in order to prompt them to plead guilty, the criminal justice system would not be able to handle the caseload before it.⁸⁵ The harm inflicted by revoking a defendant's bail, however, is grossly disproportional to the benefit conferred by a mere interest in economy. The pressures attending pretrial detention are significant,⁸⁶ and the decision to forego one's right to a trial must be made voluntarily.⁸⁷ Subjecting a defendant to conditions typically reserved for those convicted of a crime for the purpose of efficiency and economy is an excessive use of a power approved of only for regulatory purposes.

Pretrial detention is decidedly different than the charging decisions at issue in *Bordenkircher*. Where a defendant being threatened with an additional

⁷⁹ Bell v. Wolfish, 441 U.S. 520, 538 (1979).

⁸⁰ *Id.* at 538–39.

⁸¹ See *supra* notes 5–13, 20–32 and accompanying text (explaining the historical background of bail's justification).

⁸² See *Christoffel v. United States*, 338 U.S. 84, 89 (1949) (finding that a defendant cannot be sentenced to a prison term before every element of the charged crime is proven beyond a reasonable doubt).

⁸³ See *Corbitt v. New Jersey*, 439 U.S. 212, 222 (1978) (recognizing “the State's legitimate interest in encouraging the entry of guilty pleas and in facilitating plea bargaining”).

⁸⁴ See Nick Pinto, *The Bail Trap*, N.Y. TIMES, Aug. 16, 2015 (Magazine), at 42 (describing bail as a “tool of compulsion, forcing people who would not otherwise plead guilty to do so”).

⁸⁵ See H. Richard Uviller, *Pleading Guilty: A Critique of Four Models*, 41 LAW & CONTEMP. PROBS. 102, 105 (1977) (concluding that full-scale trials of more than a bare minority of felony cases would not be sustainable given current resources).

⁸⁶ See *infra* notes 88–99 and accompanying text (outlining the burdens that pretrial detention places on a defendant).

⁸⁷ See *Brady v. United States*, 397 U.S. 742, 748 (1970) (requiring that guilty pleas be made intelligently, knowingly, and voluntarily).

charge can intelligently decide between legitimate impositions of punishment, by revoking a defendant's bail he is being subjected to punishment that runs afoul of the approved-of regulatory goals of pretrial detention.

III. INVOLUNTARINESS AND INADVERTENTLY CAUSING A DEFENDANT TO PLEAD GUILTY BY REVOKING BAIL

While a prosecutor purposefully attempting to induce a guilty plea through the threat of revoking a defendant's bail is unconstitutional, instances where it can be proved that the prosecutor intended for the revocation of bail to induce the defendant to plead guilty will be rare. The far more likely scenario involves a prosecutor's decision to revoke a defendant's bail with the unintended consequence of prompting him to plead guilty. In such a case, the prosecutor's actions are not punitive. Nonetheless, the revocation of bail will necessarily apply an increased amount of pressure to some defendants who, but for the revocation of bail, would have taken their case to trial. A defendant in this scenario may attempt to challenge the validity of his plea on the grounds that it was involuntary; but such a challenge is unlikely to be successful.

A. *Pretrial Detention Applies Pressure to Multiple Facets of a Defendant's Life*

When a defendant is detained pretrial, the effects can be three-fold: detention can affect the personal, economic, and legal segments of a defendant's life. These pressures have a marked effect on the criminal justice process and have been empirically shown to cause significant negative consequences for defendants downstream.

1. *Personal Pressures*

On a personal level, the relegation of a defendant to pretrial detention rips him from his community and isolates him from the outside world.⁸⁸ A defendant's relationships with his friends and family can be disrupted, and even destroyed.⁸⁹ Custody of children may be permanently lost, and the defendant can be at risk of being evicted from his home. While detained, the accused's personal privacy is significantly diminished. His conversations are constantly monitored by guards, his mail is searched, and he is frequently subjected to invasive searches of his person.⁹⁰ This disrupts—sometimes permanently—the personal life of a defendant prior to the adjudication of his

⁸⁸ Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L.J. 1344, 1358 (2014).

⁸⁹ See Alschuler, *supra* note 1, at 517 (postulating that friends and family members lose interest in the accused when they are detained pretrial, often failing to write or visit).

⁹⁰ Wiseman, *supra* note 88, at 1353–54.

guilt.

2. *Economic Pressures*

Pretrial detention can also cause a defendant substantial financial hardship. For obvious reasons, a detainee who was employed prior to being detained will not be able to continue his employment while awaiting trial. This has both short-term and long-term consequences. Short-term, the detainee and his family are deprived of the immediate financial support the defendant could have provided if he were employed outside of the detention facility.⁹¹ Long-term, a defendant who misses work due to being detained may lose his job permanently, even if his detention lasts only a short time.⁹²

3. *Legal Pressures*

Legally, a defendant who is detained pretrial will face substantial difficulties mounting his defense. A defendant who is detained will often have trouble communicating with his attorney and preparing for trial.⁹³ Defense attorneys, often overworked, rely heavily on their clients to assist them in preparing their case.⁹⁴ While the defendant is detained, however, his ability to reach out to prospective defense witnesses or gather other evidence to support his case is frustrated.⁹⁵ This inability of the defendant to meet with his defense lawyer becomes especially troublesome at trial during overnight recesses where the defense lawyer must make a choice between spending valuable hours at the office preparing for the next day, or spending them at the jailhouse gaining input from his client.⁹⁶

Further, pretrial detention may affect the demeanor and appearance of a defendant in the courtroom, which can influence how a jury perceives him during trial.⁹⁷ The regimented living and crowded cells can cause a defendant to appear unshaven, unwashed, unkempt, and unhappy as he enters the

⁹¹ *Id.* at 1356–57. Similarly, when a defendant is unable to work, he is also less likely to be able to afford private counsel. Sam J. Ervin, Jr., *Preventive Detention: An Empirical Analysis—Foreword: Preventive Detention—A Step Backward for Criminal Justice*, 6 HARV. C.R.-C.L. L. REV. 291, 348 (1971).

⁹² Wiseman, *supra* note 88, at 1356–57.

⁹³ *Id.* at 1355–56.

⁹⁴ See ABA STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* (2004) at 7–8, 17–18 (finding, *inter alia*, that indigent defense systems in the United States were severely underfunded, and caseloads were excessive).

⁹⁵ Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2493 (2004).

⁹⁶ Kalhous & Meringolo, *supra* note 5, at 847.

⁹⁷ Michael J. Eason, *Eighth Amendment—Pretrial Detention: What Will Become of the Innocent?*, 78 J. CRIM. L. & CRIMINOLOGY 1048, 1065 (1988). The conditions for defendants being detained pretrial can often be worse than for those already convicted. Alschuler, *supra* note 1, at 517.

courtroom.⁹⁸ Lack of nourishment, medicine, and exercise can also contribute to a defendant's lackluster presence beside defense counsel.⁹⁹ Altogether, being detained pretrial puts the defendant at a severe disadvantage as he presents his case at trial.

4. *Effects on the Criminal Justice Process*

While most of these pressures are more severe when the accused is detained for the entire pretrial process, some of these pressures are exacerbated when bail is revoked as opposed to denied. Behavioral science has demonstrated that the effects of detention are felt most strongly during the time period when it is first imposed.¹⁰⁰ This phenomenon, called the hedonic treadmill, posits that a detainee will initially experience a higher effective state when he is initially detained, but will eventually come to adapt to the new set of circumstances, lessening the experienced discomfort.¹⁰¹ In the bail context, this means that the defendant whose bail is revoked will feel the maximum level of discomfort at least twice. First, he will experience it when he is initially arrested and detained awaiting arraignment;¹⁰² then he will again experience it when his bail is revoked.¹⁰³ Defendants who are twice detained may experience greater sting from the physical and psychological discomfort of a cramped cell and lack of privacy than the defendant who is left detained for the entire pretrial period.¹⁰⁴ The defendant's family may experience more difficulties adjusting to life without the defendant's income if they are lulled into the false hope that, once released on bail, his earnings will recommence. Finally, his legal defense may be harmed if the defense

⁹⁸ Patricia Wald, *Foreward: Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U. L. REV. 631, 632 (1964).

⁹⁹ Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941, 944–45 (1970).

¹⁰⁰ See Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 187–88 (finding that the duration of a sentence may not have the desired deterrent effect because the detainee will adapt to his surroundings and cause the “bite” of detention to neutralize).

¹⁰¹ See *id.* (“[P]eople who move from a neutral affective state to a set of circumstances that initially produce a higher affective state come to adapt to that new set of circumstances, and experience it as a lapsing back to affective neutrality.”).

¹⁰² See *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (allowing a defendant to be detained for up to forty-eight hours before arraignment occurs).

¹⁰³ It likely will not take long for a defendant to become reacclimated to society to the point where he will feel the full sting of detention when his bail is revoked. Cf. *Maryland v. Shatzer*, 559 U.S. 98, 110 (2010) (“It seems to us that [release] period is 14 days. That provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.”).

¹⁰⁴ This situation is exacerbated by the fact that the physical conditions of confinement are often worse for untried defendants who are detained in local jails rather than in penitentiaries. Alschuler, *supra* note 1, at 517.

strategy constructed while the defendant is out on bail requires both the defendant and his lawyer take certain steps.¹⁰⁵ If the defendant's bail is revoked prior to his role being completed, then the time the defendant's lawyer spent working on that avenue of defense will be squandered if he is unable to find the resources to complete the defendant's role himself.

5. *The Empirical Effects of Pretrial Detention*

The pressures of pretrial detention persist, albeit at different intensities, throughout the entire period the accused is detained awaiting trial, which for many can take months.¹⁰⁶ Studies have shown that the effects of pretrial detention have real-life downstream consequences for defendants. There is ample anecdotal evidence to suggest that pretrial detention can cause an otherwise innocent defendant to plead guilty.¹⁰⁷ Recently, however, empirical studies using quasi-experimental design have gone beyond just anecdotal evidence to show the measurable downstream effects pretrial detention can have on an individual defendant.¹⁰⁸ One study, analyzing the effect of pretrial detention on defendants in Philadelphia, found that defendants detained pretrial were thirteen percent more likely to receive a guilty disposition.¹⁰⁹ The difference, according to the author, was due to defendants deciding to plead guilty when they were otherwise likely to be acquitted or have their charges dropped.¹¹⁰

Pretrial detention also seems to place a substantial burden on those least able to bear it. Another study analyzing the effect of pretrial detention in Harris County, Texas found detained defendants 25% more likely to plead

¹⁰⁵ This could be something as simple as an alibi defense. In such a scenario, the defendant's lawyer may research the legal issues, but depend on the defendant to find witnesses to support his defense.

¹⁰⁶ Wiseman, *supra* note 88, at 1354.

¹⁰⁷ See, e.g., Curry v. Yachera, 835 F.3d 373, 376 (3d Cir. 2016) (criticizing the use of pretrial detention against defendants posing little risk or public safety risk as forcing defendants to accept a plea in order to be set free); Pinto, *supra* note 84, at 42 (characterizing bail as a tool used to push criminal cases towards a guilty plea).

¹⁰⁸ Including those detailed below, there are at least four other empirical studies using quasi-experimental design to assess the downstream effects of pretrial detention. See Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 714–15 (2017); Will Dobbie, Jacob Goldin & Crystal Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 22511, 2016), <https://www.nber.org/papers/w22511>; Arpit Gupta, Christopher Hansman & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization* 2 (Colum. Law & Econ., Working Paper No. 531, 2016), <http://ssrn.com/abstract=2774453>; Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from NYC Arraignments* 3 (Nov. 9, 2016), http://home.uchicago.edu/~npope/pretrial_paper.pdf; Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* 3 (Jan. 12, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2777615.

¹⁰⁹ Stevenson, *supra* note 108, at 3.

¹¹⁰ *Id.*

guilty than otherwise similarly situated defendants.¹¹¹ These defendants were also more likely to receive sentences that required jail time.¹¹² The effects were further compounded by the finding that defendants with income in the bottom 10% of the population were eight percentage points more likely to be detained pretrial than the average defendant.¹¹³ These are defendants who stand to benefit the most from pretrial release. Their households are in greatest need of the income they could provide if they were able to return to work, and they are likely to be represented by an overworked public defender.¹¹⁴

Furthermore, defendants who are detained pretrial may feel greater pressure to plead guilty to the extent the time they spent detained pretrial will allow them to be released with time served.¹¹⁵ This is especially true for first-time offenders whose sentences are least likely to carry a prison sentence. In part because of the relative increased psychological and emotional discomfort placed on those who are not accustomed to pretrial detention, some detainees respond differently after being detained a second or successive time.¹¹⁶ These pressures caused first-time offenders, and those who were least acclimated to detention, to be more likely to plead guilty in order to cut their detention short.¹¹⁷

This evidence is alarming. A primary goal of any criminal justice system should be to ensure that the guilty, and only the guilty, face criminal punishment. If these above studies are correct, and it is the pressures of pretrial detention that cause a defendant to plead guilty rather than consciousness of guilt, then the criminal justice system is failing. A pretrial detention system which facilitates the guilty plea and subsequent punishment of innocent defendants is a pretrial detention scheme that needs to be reworked.

B. *Due Process and Voluntariness*

Guilty pleas are serious business, and involve the waiver of a number of

¹¹¹ Heaton et al., *supra* note 108, at 717.

¹¹² *Id.* at 747.

¹¹³ *See id.* at 738 (using the defendant's zip code as a proxy for income and finding that defendants in the lowest income decile were eight percentage points more likely to be detained than other defendants with similarly assigned bail). Alternatively, those in the top 10% were nine percentage points less likely to be detained pretrial. *Id.*

¹¹⁴ *See supra* note 94 and accompanying text (citing an ABA report supporting the claim that public defendants are often overworked).

¹¹⁵ *See Pinto, supra* note 84, at 42–43 (explaining how a defendant detained pretrial can be pressured to plead guilty in order to be released on the same day, getting credit for the time he spent detained pretrial); Heaton et al., *supra* note 108, at 747–748 (“[D]etention induces guilty pleas . . . [by] causing some defendants to ‘pre-serve’ their expected sentences, so that contesting guilt has little ultimate effect on the amount of punishment . . .”).

¹¹⁶ Heaton et al., *supra* note 108, at 748–49.

¹¹⁷ *Id.* at 749.

rights that are foundational to our system of justice. In one sense the defendant is forfeiting his right to silence by bearing witness against himself; in another he is foregoing his right to a jury trial.¹¹⁸ Given their grave importance, pleas induced by “actual or threatened physical harm or by mental coercion overbearing the will of the defendant” are involuntary, and cannot stand.¹¹⁹

In considering voluntariness it must be admitted up front that, to some extent, every guilty plea is coerced.¹²⁰ Indeed, it is unlikely that any defendant would plead guilty if there were not some promise of leniency or advantage in return. If the penalty for pleading guilty were equal to going to trial, the defendant would have nothing to lose by rolling the dice on the chance of an acquittal. It is the mutuality of advantage to both the defendant and the prosecutor that makes guilty pleas possible.¹²¹ Just because the defendant is afforded some form of relief from an otherwise precarious situation does not mean that a plea should be invalidated; to hold otherwise would result in invalidating every guilty plea. There is a point, however, where the defendant’s will becomes overborne, and a guilty plea can no longer be considered a voluntary act.

A plea’s voluntariness is a context-dependent inquiry which takes into account all of the circumstances surrounding the defendant’s decision to plead guilty.¹²² Some circumstances that may counsel towards a finding of involuntariness include ignorance, incomprehension, coercion, terror, inducement, and subtle or blatant threats.¹²³ While these factors all bear on involuntariness, the analysis lends itself to a sliding scale. For example, at issue in *Brady v. United States* was a constitutionally invalid sentencing scheme which tended to encourage defendants to plead guilty in order to avoid the possible imposition of the death penalty.¹²⁴ Brady claimed that his guilty plea was coerced and should be invalidated because the fear of death motivated his decision to plead guilty.¹²⁵ The Court, however, disagreed. It refused to accept a per se

¹¹⁸ *Brady v. United States*, 397 U.S. 742, 748 (1970).

¹¹⁹ *Id.* at 750.

¹²⁰ *See United States v. Buckles*, 843 F.2d 469, 472 (11th Cir. 1988) (“All pleas of guilty are the result of some pressure or influences on the mind of the defendant.” (quoting *Schnautz v. Beto*, 416 F.2d 214, 215 (5th Cir. 1969)).

¹²¹ Briefly, for a defendant whose chance of acquittal is slim, he can have his exposure reduced, begin the correctional process immediately, and eliminate the practical burdens of a public trial. *Brady*, 397 U.S. at 751. For the prosecutor, the assurance of liability, the conservation of scarce government resources, and the prompt imposition of punishment can all motivate the prosecutor in coming to the prompt resolution of criminal matters. *Id.* at 752.

¹²² *Id.* at 742.

¹²³ *Boykin v. Alabama*, 395 U.S. 238, 242–43 (1969).

¹²⁴ *Brady*, 397 U.S. at 745–46. Under the scheme, it was only possible to be sentenced to death if a jury so recommended. *Id.* Therefore, if the defendant pleaded guilty there would be no jury determination, and thus no opportunity for the death penalty to be imposed.

¹²⁵ *Id.* at 746.

rule that a guilty plea is involuntary whenever the defendant desires to accept the certainty of a lesser penalty rather than face the possibility of a greater one following trial.¹²⁶ Instead, the Court found Brady able to rationally weigh the advantages of going to trial against the advantages of pleading guilty.¹²⁷ Prior to Brady's decision to plead guilty, his co-defendant had confessed and was prepared to testify against him.¹²⁸ According to the Court, it was this development, rather than the possibility of the death penalty, that prompted Brady to plead.¹²⁹ Taking into account the entirety of the circumstances, the Court found Brady aware of the direct consequences, including the actual value of any commitments made to him, and affirmed his guilty plea.¹³⁰

On the other end of the spectrum was *Machibroda v. United States* where the prosecutor allegedly promised Machibroda multiple times that he would not receive a sentence in excess of twenty years if he pleaded guilty.¹³¹ After pleading guilty, Machibroda was sentenced to twenty-five years in prison.¹³² Without deciding the factual issue of whether the prosecutor actually made those promises, the Court found that if such promises were in fact made, they would deprive Machibroda's guilty plea of its voluntary nature and open it to collateral attack.¹³³ While the Court was not specific, it is intuitive that a false-promise with respect to the possible sentence associated with pleading guilty would make a plea involuntary. Where *Brady* focused on the ability of a defendant to consult with counsel and weigh the possible consequences of going to trial as opposed to pleading guilty,¹³⁴ Machibroda was given no such opportunity. If Machibroda had been able to sit down with his attorney and consider the pros and cons of pleading guilty, the prosecutor's false-promise would have skewed his calculation. Thus, as the Court determined, the plea would have been involuntary.¹³⁵

Other cases further reinforce the purpose of the test being the defendant's ability to weigh the alternatives of going to trial against pleading guilty. In *North Carolina v. Alford*, the Court upheld a plea as voluntary despite the fact that Alford never admitted his guilt.¹³⁶ The Court reasoned that he was able

¹²⁶ *Id.* at 751.

¹²⁷ *Id.* at 750.

¹²⁸ *Id.* at 749.

¹²⁹ *Id.*

¹³⁰ *Id.* at 755.

¹³¹ 368 U.S. 487, 489 (1962). Further, it was alleged that the defendant was not allowed to discuss the promises with his counsel. *Id.* at 489–90.

¹³² *Id.* at 488.

¹³³ *Id.* at 493.

¹³⁴ See *Brady*, 397 U.S. at 750 (finding that the defendant's plea was voluntary because he was able to "rationally weigh the advantages of going to trial against the advantages of pleading guilty").

¹³⁵ *Machibroda*, 368 U.S. at 493.

¹³⁶ 400 U.S. 25, 30–31 (1970).

to weigh the risks of going to trial even if he maintained his innocence.¹³⁷ Further, a plea entered because counsel is unprepared for trial is involuntary.¹³⁸ Ineffective assistance of counsel would surely make it impossible for a defendant to fully consider if it were beneficial for him to plead guilty.¹³⁹

Therefore, defendants who would claim that their revocation of bail made their guilty plea involuntary face a difficult task. They will have to show that the revocation of their bail altered their ability to make an intelligent calculus in deciding whether or not to plead guilty.¹⁴⁰ To the defendant detained pretrial, the consequences of going to trial and the consequences of pleading guilty are set out before him. Assuming the defendant has competent counsel, he is aware of what his potential exposure will be if he decides to plead guilty, and he is aware of his potential exposure if he goes to trial. Furthermore, the defendant is aware that if he decides to go to trial, there is a good chance he will continue to be detained for the remainder of his case.

The pressures that are exerted by his pretrial detention, while significant and arguably harsh, are regulatory measures set forth by the legislature in order to facilitate the resolution of criminal matters. It does not work to deceive or mislead the defendant when he is calculating the risks and advantages of taking his case to trial. While the defendant's calculus may, as a practical matter, be influenced by his pretrial detention, such detention is no more coercive to his plea than a rule of evidence allowing his co-defendant to serve as a witness against him. In either circumstance, the measure is meant to ensure that the criminal process works. Pretrial detention is meant to ensure the defendant appears at trial and does not commit further crimes while in the interim period.¹⁴¹ Alternatively, rules of evidence are meant to make the accuracy of the fact-finding processes more efficient.¹⁴² Defendants detained

¹³⁷ See *id.* at 37–38 (finding that the strong evidence against Alford warranted his guilty plea, and that he could consent to the imposition of a prison sentence despite maintaining innocence).

¹³⁸ *United States v. Moore*, 599 F.2d 310, 313 (9th Cir. 1979).

¹³⁹ The Sixth Amendment right to counsel applies at the plea bargaining stage. See *Lafler v. Cooper*, 566 U.S. 156, 162 (2012) (requiring that defendants have the assistance of effective counsel when considering whether to accept a guilty plea). This is because the complexities that attend the plea bargain context require the expertise of a lawyer to navigate. See *id.* at 165 (finding that counsel is guaranteed at critical stages where a defendant cannot be thought to make decisions without counsel's advice). If counsel is not prepared for trial, then a defendant cannot properly consider the pros and cons of going to trial, and thus his calculations are skewed.

¹⁴⁰ The Court in *Brady* also explained that “actual or threatened physical harm or [] mental coercion overbearing the will of the defendant” would invalidate a guilty plea. *Brady v. United States*, 397 U.S. 742, 750 (1970). If the prosecution were to use the threat of bail to intentionally extract a plea, *Brady* would support invalidating such a plea. *Id.* at 758.

¹⁴¹ See *supra* notes 5, 54–57 and accompanying text (identifying the purposes of bail as ensuring the accused's presence at trial and preventing further crimes from being committed while awaiting trial).

¹⁴² See Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 307–308 (1994) (opining that the rules of evidence strike a balance between accuracy and legal

pretrial have not been deprived of their ability to rationally weigh the consequences of their choice. The fact that the defendant is forced to make a difficult decision is “‘an inevitable’—and permissible—‘attribute of any legitimate system which tolerates and encourages the negotiation of pleas.’”¹⁴³

IV. COMBATING GUILTY PLEAS FROM INNOCENT DEFENDANTS THAT FOLLOW ON THE HEELS OF BAIL REVOCATION

Even if a guilty plea following the revocation of a defendant’s bail is voluntary as a constitutional matter, if bail revocations are serving as a vehicle to induce innocent defendants to plead guilty, a properly functioning criminal justice system should not only take note, but should institute measures to minimize the incidence of guilty pleas by innocent defendants. An initial reaction may be to encourage the rejection of guilty pleas when the judge fears it may be done under the coercion of pretrial detention.¹⁴⁴ Applying a more rigorous standard to the prosecution’s alleged factual basis may, at first glance, seem to effectively minimize the risk of innocent pleas, but the practical problems that follow rejecting guilty pleas of detained defendants make this solution unworkable.¹⁴⁵

Instead, an approach is needed that alleviates the pressures of pretrial detention while continuing to ensure that the twin goals of pretrial detention are met. One way to attain this goal is to, once again, release the defendant on bail with different or more stringent conditions. Another potential solution would be to fast-track the defendant’s trial date.¹⁴⁶

costs).

¹⁴³ *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973)).

¹⁴⁴ See John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?*, 126 U. PA. L. REV. 88, 123 (1977) (finding that federal trial court judges possess sufficient discretion to reject a guilty plea even if a factual basis for the plea technically exists).

¹⁴⁵ For instance, it leaves the defendant, whose guilty plea is rejected because of an inadequate factual basis, to wallow in pretrial detention while awaiting trial—the precise consequence his guilty plea was meant to avoid. In some instances, it may even be in the defendant’s best interest to be allowed to plead guilty despite the fact that he is innocent. See Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1133–35 (2008) (arguing that the process costs of maintaining an innocent plea may not be practical for innocent defendants whose post-trial sentence would be less than their pretrial detention).

¹⁴⁶ The solutions for which I advocate in this Part are reserved for defendants who were in technical violation of their pretrial release orders. This would include violations such as missing curfew, being late or missing a drug screening appointment, or skipping anger management classes. These types of violations account for approximately 77% of federal bail revocations. See THOMAS H. COHEN, U.S. DEP’T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRETRIAL RELEASE AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 2008–2010, at 13 (2012) (finding that 17% of all federal defendants released pretrial committed technical violations, while 4% were rearrested on new offenses, and 1% failed to make court appearances). Defendants who either fail to appear at a hearing, or are properly rearrested while on pretrial release would either be a flight risk in the

A. Considering a Second Round of Pretrial Release

The most direct way to alleviate the pressures of pretrial detention for a defendant prepared to plead guilty due to the effects of being detained is to release him with a more tailored set of release conditions. Initial bail hearings chronically occur on the fly, and while a defendant's right to counsel has typically attached by the time of the initial bail hearing,¹⁴⁷ there is no consensus on whether bail hearings are a critical stage which would require counsel to be appointed and present.¹⁴⁸ Guaranteeing counsel's presence at a revocation proceeding will provide the advocacy necessary to ensure that the adversarial process functions, leading to a more properly tailored set of release conditions. Judges confronted with a defendant who is in technical violation of his bail conditions should be open to considering a modification of the original release conditions rather than presuming that the defendant's bail should be unequivocally revoked.

1. Defendants Should Have Counsel Present During Bail Revocation Proceedings

Defendants' Sixth Amendment right to counsel attaches "at the first appearance before a judicial officer at which [the] defendant is told of the formal accusation against him and restrictions are imposed on his liberty."¹⁴⁹ Upon attachment, counsel must be appointed in time to be present and effective at any critical stage of the criminal proceedings.¹⁵⁰ A critical stage occurs when "potential substantial prejudice to [the] defendant's rights inheres in the particular confrontation and the ability of counsel [will] help avoid that prejudice."¹⁵¹ The Court has most recently described critical stages as "proceedings between an individual and agents of the State . . . that amount to 'trial-like confrontations,' at which counsel would help the accused 'in coping with legal problems or . . . meeting his adversary.'"¹⁵² With the rising importance of the criminal pretrial process, if a defendant does not

case of failing to appear, or be a danger to the community in the case of being rearrested. In such cases, pretrial detention would be more appropriate, and would meet the twin aims of pretrial detention articulated in *Salerno*. *United States v. Salerno (Salerno III)*, 481 U.S. 739, 761 (1987).

¹⁴⁷ See *Rothgery v. Gillespie County*, 554 U.S. 191, 194 (2008) (finding that the right to counsel attaches at "the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty").

¹⁴⁸ See *United States v. Wade*, 388 U.S. 218, 224 (1967) (requiring counsel to be appointed and present at critical stages of critical proceedings); Heaton et al., *supra* note 108, at 736–38 (detailing the varying ways jurisdictions deal with appointed counsel at bail hearings).

¹⁴⁹ *Rothgery*, 554 U.S. at 194.

¹⁵⁰ *Id.* at 212.

¹⁵¹ *Coleman v. Alabama*, 399 U.S. 1, 7 (1970).

¹⁵² *Rothgery*, 554 U.S. at 212 n.16 (citation omitted) (quoting *United States v. Ash*, 413 U.S. 300, 312–13 (1973)).

have counsel at these critical stages, the eventual trial may end up being nothing more than a formality.¹⁵³ Taken together, when a particular proceeding is sufficiently complex that a lawyer would help a criminal defendant in navigating the proceeding, and the ramifications are sufficient to prejudice the defendant's trial, counsel must be present and effective.

Arguably, the high stakes of the initial bail hearing present a strong starting point for deeming it a critical stage, and requiring counsel's presence. However, it is perhaps the rather simple nature of that first bail hearing—often taking into account little more than the crimes charged and the defendant's criminal history¹⁵⁴—which has led to disparate treatment of whether defense counsel's presence is compulsory.¹⁵⁵ Still, the Court has acknowledged that counsel can be influential on bail matters,¹⁵⁶ and empirical studies have shown that defense counsel can have significant effects on pretrial release decisions.¹⁵⁷ With regard to revocation hearings, in contrast to initial bail hearings, states have begun to conduct these hearings as full-blown adversarial proceedings, making the need for counsel's presence even more pronounced.¹⁵⁸ In the likely event that direct and cross examination of witnesses is necessary, a defendant will find it difficult to perform these functions without counsel. The complex nature of revocation proceedings requires a lawyer's expertise to provide the defendant with a chance to effectively meet the prosecution's allegations and arguments. Furthermore, the downstream consequences of a bail revocation have the propensity to significantly prejudice the defendant's future trial.¹⁵⁹ The intricacies of increasingly adversarial revocation proceedings, combined with the propensity for counsel's advocacy to impact bail decisions, and the significant prejudice a defendant may face

¹⁵³ See *Wade*, 388 U.S. at 224 (“[T]oday’s law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused’s fate and reduce the trial itself to a mere formality.”).

¹⁵⁴ See Sandra Guerra Thompson, *Do Prosecutors Really Matter?: A Proposal to Ban One-Sided Bail Hearings*, 44 *HOFSTRA L. REV.* 1161, 1169 (2016) (criticizing the practice in many jurisdictions of setting bail according to a schedule based on the charged offense and the defendant’s criminal history).

¹⁵⁵ Heaton et al., *supra* note 108, at 773–74 (“[O]nly ten states uniformly provided counsel at an accused’s first appearance. Ten states uniformly provided no counsel. The remaining thirty appointed counsel ‘in select counties only.’”) (footnotes omitted).

¹⁵⁶ *Coleman*, 399 U.S. at 9.

¹⁵⁷ WAYNE R. LAFAYE ET AL., 4 *CRIM. PROC.* § 12.1(c), at 16–17 (4th ed. 2015) (finding that 75% of represented defendants were released on their own recognizance compared to only 25% of non-represented defendants). One study in particular showed that the recommendations of the prosecutor and the defense attorney were the only two factors that could predict bail outcomes. See Ebbe B. Ebbeson & Vladimir J. Konecni, *Decision Making and Information Integration in the Courts: The Setting of Bail*, 32 *J. PERSONALITY & SOC. PSYCHOL.* 805, 814–15 (1975) (finding that judges rely primarily only on the recommendations of prosecutors and defense attorneys in setting bail).

¹⁵⁸ See *State v. Burgins*, 464 S.W.3d 298, 309 n.6 (Tenn. 2015) (citing to multiple jurisdictions which require adversarial bail revocation proceedings).

¹⁵⁹ See *supra* Part III.A. (describing the pressures of pretrial detention).

without counsel, builds a strong foundation for deeming bail revocation hearings a critical stage for which counsel should be provided.¹⁶⁰

2. *Effective Counsel's Impact on a Receptive Judge at Revocation Proceedings*

Having counsel present at revocation hearings will allow arguments to be made that may have been overlooked at the initial bail hearing. Understanding the pertinent factors judges consider in their bail decisions, counsel can bring relevant facts that are specific to a client's background to the court's attention, and request potential bail conditions in a way that a defendant unaware of judicial proceedings, let alone pretrial detention proceedings, cannot.¹⁶¹

While there is some weight to be afforded against a defendant who "thumbs his nose" at the orders of a court,¹⁶² the lack of adversarial rigor, and the general inability of a defendant to effectively advocate for himself should prompt a prudent judge to be willing to reconsider the initial bail order. While it is typically within the trial court's discretion to modify or revoke a defendant's bail,¹⁶³ that discretion should be exercised with thorough care.¹⁶⁴ A revocation that is not aimed at either ensuring the defendant's presence at trial, or the safety of the community, would be an improper revocation. To that point, the defendant has now had the opportunity to show

¹⁶⁰ It should be noted that the Court has wavered on whether probation revocation hearings, which are arguably similar to bail revocation hearings in certain respects, are a critical stage sufficient to make counsel compulsory. See *Gagnon v. Scarpelli*, 411 U.S. 778, 786–90 (1973) (finding that, depending on the circumstances of an individual case, most revocation hearings do not require counsel). In *Gagnon*, however, the Court thought that the presence of a probation officer, as well as the often open-and-shut nature of most of the probation proceedings, made the majority of probation revocation hearings something less than adversarial. *Id.* at 787–89. This is unlike bail revocation proceedings which are both adversarial in nature and often require complex arguments. Nonetheless, *Gagnon* was unwilling to hold that counsel was optional in all probation revocation hearings because "the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence." *Id.* at 786–87. These considerations should similarly apply to bail revocation proceedings, where defendants additionally do not have the luxury of a probation officer who can, in the right circumstances, advocate on their behalf.

¹⁶¹ See *LAFAYETTE ET AL.*, *supra* note 157, at 18 ("One reason that the participation of a defense attorney makes such a difference is that he 'can bring relevant facts about his client's background to the judge's attention.'" (citation omitted)).

¹⁶² See *PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* 123 (2008) (arguing that a defendant who violates the law time and time again may deserve some form of increased punishment).

¹⁶³ See, e.g., *State v. Brown*, 396 A.2d 134, 138 (Vt. 1978) (placing the revocation of a defendant's pretrial release within the discretion of the trial judge).

¹⁶⁴ See *Bitter v. United States*, 389 U.S. 15, 17 (1967) (finding a single, brief incident of tardiness without a record of other misconduct had "the appearance and effect of punishment rather than of an order designed solely to facilitate the trial").

that he is not a flight risk by attending any court hearings in the interim, and has also had the opportunity to show he is not a danger to the community by avoiding being re-arrested on a substantive offense during the pretrial period.

3. *Judges Have Many Options in Considering Pretrial Release Conditions*

Bail decisions are more of an art than a science. Judges take into consideration the flight risk and danger to the community posed by a particular defendant when deciding whether to detain or release them. After coming to a relative conclusion, the judge must then consider whether there are release conditions that, despite the defendant's apparent propensity for flight or danger, can nonetheless assure the appearance of the defendant and the safety of the community.¹⁶⁵ In doing so, the judge has a multitude of conditions to consider imposing.

With the advent and advances of electronic monitoring, the flight risk of a defendant has become an increasingly inadequate justification for refusing to release most defendants pretrial. Cutting-edge electronic monitoring in the United States utilizes GPS tracking to record the movements of defendants.¹⁶⁶ These devices provide real-time updates on the location of defendants within up to a ten-meter radius.¹⁶⁷ The effectiveness of these systems appears promising,¹⁶⁸ and they have the potential to be at least as economical as detention or bail.¹⁶⁹ While electronic monitoring may not completely extinguish flight risk, it serves as a significant reason to discount flight as a justification for detaining the average defendant.

For dangerousness, release conditions are typically provided by statute.¹⁷⁰ They vary from jurisdiction to jurisdiction, but at bottom the release conditions are meant to counteract the cause of the defendant's dangerousness.¹⁷¹ For example, if a defendant's anger provided the spark for the charged offense, and the judge was worried that it would resurface if he were released pretrial, the judge may order the defendant to attend anger management counseling. Similar examples abound: Courts may order a defendant to stay

¹⁶⁵ See, e.g., 18 U.S.C. § 3142(e) (2012) (“If, after a hearing . . . the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of . . . the community, such judicial officer shall order the detention of the person . . .”).

¹⁶⁶ Wiseman, *supra* note 88, at 1366–67.

¹⁶⁷ *Id.* at 1367.

¹⁶⁸ See *id.* at 1370–72 (praising electronic monitoring as a potential replacement to money bail, but admitting that further empirical study is required to be sure).

¹⁶⁹ See *id.* at 1372–74 (finding that, depending on the rigor of the monitoring, electronic monitoring has the potential to be cheaper than pretrial detention, but that, once again, further investigation is necessary).

¹⁷⁰ See, e.g., 18 U.S.C. § 3142(c)(1)(B).

¹⁷¹ See Karnow, *supra* note 16, at 12 (characterizing certain bail conditions as being set in order to “confront the underlying cause of offenses”).

away from certain individuals if they are concerned that contact with those people may erupt in violence,¹⁷² or refrain from possessing weapons if they fear that such possession could further destructive behavior.¹⁷³ If a defendant has a habit of getting angry and violent when consuming alcohol, a court may order the defendant to refrain from drinking.¹⁷⁴ Similarly, a defendant can be ordered to undergo certain medical, psychological, or psychiatric treatment to pull him or her out of treatable violent behavior.¹⁷⁵ These are only a few of the many tools judges have in their arsenal to combat a defendant's dangerousness.

These are all options a defendant likely has no idea exist, and even less likely is the prospect of him being able to effectively persuade the court to order them in his particular case. Providing the defendant with counsel at his revocation proceeding should decrease the incidence of overbroad bail conditions by providing the court with adversarial testing, defendant-specific facts, and creative solutions to prevent flight and dangerousness. Courts presented with a second chance to make an accurate assessment of a defendant's specific flight risk and potential danger to the community should not rely too heavily on conditions untested by the adversarial process, but should evaluate the defendant's need for pretrial detention in light of the circumstances presented at his revocation hearing. This does not mean that the defendant will be released in every circumstance. Indeed, there may very well be violations that indicate that this defendant is clearly a flight risk, or is clearly a danger to the community. In such cases, courts should revoke a defendant's bail, but it should do so based upon the record before it, not on the reliance of a previous proceeding in which the defendant was at a procedural disadvantage.

B. Minimizing Time Spent in Pretrial Detention: The Rocket Docket

Even if a defendant's bail is revoked as opposed to modified, other measures to ensure that the revocation does not work to induce an innocent guilty plea are worthy of consideration. Accelerating the defendant's trial date and preventing him from having to languish in prison for an extended period of time is one possible way to minimize the pressure to plead guilty. Courts possess inherent powers to control their dockets and their calendars,

¹⁷² See, e.g., 18 U.S.C. § 3142(c)(1)(B)(v). This restriction can be enforced by electronic monitoring, allowing the government to recoup on the benefits of electronic monitoring twice. See Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 B.Y.U. L. REV. 837, 896 (2016) (finding that electronic monitoring can be used to both prevent a defendant's disappearance as well as ensure defendants abide by stay-away orders).

¹⁷³ See, e.g., 18 U.S.C. § 3142(c)(1)(B)(viii).

¹⁷⁴ See, e.g., 18 U.S.C. § 3142(c)(1)(B)(ix).

¹⁷⁵ See, e.g., 18 U.S.C. § 3142(c)(1)(B)(x).

and accelerating a trial date is squarely within the control of the trial court.¹⁷⁶

A judge's acceleration decision can effectively be exercised at a number of points during the course of a criminal case. When a defendant is deciding to plead guilty on the heels of a bail revocation, accelerating the trial date at the plea colloquy seems especially apt. As discussed earlier, a guilty plea must be freely and voluntarily made.¹⁷⁷ During the colloquy, a defendant will be asked whether his plea is voluntary.¹⁷⁸ Inquiring as to whether the defendant is pleading guilty because of the perceived burdens of a prolonged pretrial detention will encourage a true guilty plea to defendants trying to delay the inevitable, while at the same time safeguarding against an innocent plea induced by pretrial detention.¹⁷⁹

1. *Objections to an Accelerated Trial Date*

Of course, an accelerated trial date may not be workable in every case. It would surely do a defendant no good to have his trial date moved up only for defense counsel to be unprepared for trial.¹⁸⁰ In fact, a conviction secured in the face of an unprepared defense would run the risk of being invalidated.¹⁸¹ On the other hand, if the defendant was merely resisting a guilty

¹⁷⁶ See *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936) (“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”); *McDonald v. Goldstein*, 79 N.Y.S.2d 690, 694 (N.Y. App. Div. 1948) (rejecting the District Attorney’s argument that control over the prosecution of crime included control over the trial calendar); ABA STANDARDS FOR CRIMINAL JUSTICE: SPEEDY TRIAL AND TIMELY RESOLUTION OF CRIMINAL CASES § 12-4.5(a) (3d ed. 2006) (“Control over the trial calendar, and over all other calendars on which a case may be placed, should be vested in the court.”); FELIX F. STUMPF, INHERENT POWERS OF THE COURT § 7.3, at 64 (2008) (“It is well settled that courts have substantial inherent powers to control their calendars and to supervise the conduct of litigation as long as they do not deprive parties of their fundamental constitutional rights . . .”).

¹⁷⁷ See *Brady v. United States*, 397 U.S. 742, 750 (1969) (requiring pleas to be voluntarily made); see also *supra* Part III.B.

¹⁷⁸ FED. R. CRIM. P. 11(b)(2).

¹⁷⁹ This could be as simple as asking whether a defendant has discussed with his attorney the possibility of accelerating his trial date, and whether that option is one he would like to explore. Requiring defense attorneys to advise clients on the consequences and alternatives of guilty pleas is nothing new. See, e.g., *Padilla v. Kentucky*, 559 U.S. 356, 368–69 (2010) (requiring defense attorneys to advise their clients on the possible immigration consequences of their guilty plea prior to pleading guilty).

¹⁸⁰ Such a result would be inconsistent with the whole purpose of accelerating the trial date in the first place: to prevent factors other than guilt to work towards a conviction.

¹⁸¹ See *United States v. Moore*, 599 F.2d 310, 313 (9th Cir. 1979) (“A plea entered because counsel is unprepared for trial is involuntary.”); *Ballard v. Maggio*, 554 F.2d 1247, 1250–51 (5th Cir. 1977) (remanding Ballard’s habeas petition for a hearing on ineffective assistance of counsel because a lower state court had expressed concern over defense counsel’s preparedness). If a plea can be made involuntary because of defense counsel’s unpreparedness, then a conviction should similarly be able to be overturned if the defendant can show that counsel’s lack of preparation worked to prejudice his defense under *Strickland v. Washington*. 466 U.S. 668, 681–82 (1984).

plea because pretrial release gave him little incentive to do so,¹⁸² the fact that the game is up and he is facing either a prolonged period of pretrial detention or a fast-approaching trial date may prompt him to recognize the inevitable, “acknowledge his guilt, and . . . realiz[e] whatever potential there may be for rehabilitation.”¹⁸³ A guilty defendant will obtain minimal benefit from being informed of the possibility that his trial date may be moved up if a trial is likely to bring about a conviction in any event.¹⁸⁴

Objections to an accelerated trial date by the prosecution, however, warrant less concern. Lack of preparation or case immaturity is a poor excuse to delay trying a case or keep a defendant in pretrial detention longer than necessary.¹⁸⁵ If the prosecution believes detaining the defendant is in the public’s best interest, they should protect the community by obtaining a conviction, not by drawing out the pretrial process. Even assuming there is sufficient reason to believe the defendant is a flight risk or may pose a danger to the community, if the burdens of pretrial detention have the defendant prepared to plead guilty, then the prosecution should shoulder the responsibility of either trying their case or dismissing it.¹⁸⁶ This does not mean that the defendant should simply be released; it only requires the prosecution to obtain a conviction before they can detain the defendant any longer.

2. *Preparing the Parties for Trial*

In order to responsibly expedite a trial date, judges should get involved early to minimize the chance a party comes to trial unprepared. While setting a trial date that will not be deferred can be an important part of running

¹⁸² See TASK FORCE ON DELAY REDUCTION & CASE MGMT., GUIDELINES FOR BEST PRACTICES IN DELAY REDUCTION & CASE MGMT. 5 (2004), https://www.lasc.org/la_judicial_entities/Judicial_Council/Delay_Guidelines.pdf (“Delay frequently is defense oriented, to put off the inevitable.”).

¹⁸³ *Blackledge v. Allison*, 431 U.S. 63, 71 (1977).

¹⁸⁴ On the other hand, if a guilty defendant proceeds to an accelerated trial date and is acquitted, the government has failed to carry its burden. See *In re Winship*, 397 U.S. 358, 361 (1970) (requiring the prosecution to prove every element of the charged crime beyond a reasonable doubt).

¹⁸⁵ Cf. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-3.9(a) (AM. BAR ASS’N 2015) (“A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.”). Scheduling issues with fact or expert witnesses, or a significant change in circumstance, however, may warrant reconsideration of how quickly a case should be accelerated. Even in such cases, the amount of time spent in pretrial detention should be minimized to the extent possible.

¹⁸⁶ In Philadelphia, Municipal Court judges apply their own pressures on prosecutors to try cases expeditiously. During my summer at the Philadelphia District Attorney’s Office, the prosecution would, absent extenuating circumstances, be given three opportunities to try their case. If they were not ready on the first trial listing, they would receive a continuance. If they were not ready a second time, they would be given another continuance, but the case would be marked “must be tried.” If on the third listing they were still not prepared, the presiding judge would typically dismiss the case for lack of prosecution.

an efficient docket,¹⁸⁷ being able to accelerate a trial date takes more than simply setting a date and keeping to it. Instead, deciding on a robust and firm pretrial schedule will ensure the parties are prepared for trial, and provides judges with flexibility to move the trial date up if needed.¹⁸⁸

An efficient pretrial period starts with ensuring that the prosecution's discovery responsibilities are carried out rapidly, and are regularly supplemented when necessary.¹⁸⁹ Turning over this information as quickly as possible encourages preparation for both parties. Defense counsel, of course, learns of the nature of the evidence against her client, and receives the information needed to prepare the defendant's case. The prosecutor is forced to gather his file and take a hard look at the evidence that will be used to prove his case. To facilitate the pretrial period, a scheduling conference may be necessary.¹⁹⁰ Here, any obstacles the parties have encountered during the pretrial process can be discussed, and any pending motions can be scheduled.¹⁹¹

These procedures are best practices for all cases, and they are but a few examples of how courts can ensure an efficient pretrial process that results in the parties being prepared for trial. The implementation of these techniques is of increased significance when a defendant's case has survived long enough to see the defendant released on bail, and then have it revoked some time later. Of course, there is no way to know for certain which cases will be protracted at their outset, and once the opportunity is lost there is only so much that can be done to prepare an unprepared counsel for trial at the back-end. Ultimately, the decision whether to accelerate a trial date lies within the discretion of the trial judge.¹⁹² It is likely that a case that lasts to see a defendant's bail revoked has seen many opportunities to ensure that both counsel are prepared for trial. Hopefully the pretrial process has proceeded in a fashion that permits a trial date to be moved up if the situation presents itself.

Reconsidering the conditions of the defendant's bail and providing a potential opportunity to minimize the amount of time spent detained provide

¹⁸⁷ See Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377, 399 (2010) ("[I]t is important that once the dates and limitations [for trial] are decided upon, they be kept firm, except for very good cause shown.").

¹⁸⁸ See generally STANDARDS FOR CRIMINAL JUSTICE: SPEEDY TRIAL & TIMELY RESOLUTION OF CRIMINAL CASES § 12-4.3 (AM. BAR ASS'N 2006) (describing pretrial procedures for an "effective overall criminal caseflow").

¹⁸⁹ See *id.* at § 12-4.3(a)-(d), (g) (outlining what elements constitute "effective overall criminal caseflow"). Much of this information can be turned over before the defendant's initial appearance. *Id.* at § 12-4.3(g) cmt.

¹⁹⁰ *Id.* at § 12-4.3(i).

¹⁹¹ *Id.* at § 12-4.3(i)(1)-(2) and § 12-4.3(i) cmt.

¹⁹² See TRIAL MGMT. STANDARDS 1 cmt. (AM. BAR ASS'N 1992) (opining that the trial judge is in the best position to see that trials remain an opportunity for litigants to effectively present their case to a trier of fact).

two safety nets to prevent pretrial detention from working to produce the conviction of an innocent defendant. Implemented together, these two procedural safeguards can provide realistic protection of innocent defendants while still preserving a functioning criminal justice system.

CONCLUSION

Pretrial detention can be used as a legitimate tool to further the meaningful regulatory goals of Congress—namely, ensuring an accused’s presence at trial and preventing him from committing crimes while released pending trial. It also has the propensity, however, to induce a defendant to plead guilty despite his innocence. While a prosecutor who intentionally uses pretrial detention as a punitive means to induce a guilty plea has violated the defendant’s due process rights, the analysis is much more nuanced when it is done inadvertently. The fact that pretrial detention induces a defendant to plead guilty does not necessarily mean that plea violated the Constitution. Even still, further steps can be taken to ensure a measure meant for purely regulatory purposes does not become punitive by working to convict innocent defendants. The pressures from pretrial detention are real, and they have real downstream consequences for those forced to sit in jail awaiting the determination of their guilt or innocence. It is incumbent upon all members of the criminal justice system to ensure that innocent defendants are not coerced into pleading guilty.

